

D.P.U./D.T.E. 97-105

Petition of the Eastern Edison Company and Montaup Electric Company for approval of their Amended Plan for Implementing Generation Divestiture and Corporate Restructuring filed on November 21, 1997, and for approval by the Department of Telecommunications and Energy of the sale of Montaup Electric Company's 160 megawatt Somerset Station electric generating plant to Somerset Power LLC, and for approval of the sale of Montaup Electric Company's 1.96 percent interest in Wyman Station electric generating plant to FPL Energy Wyman IV LLC.

Request by Eastern Edison Company and Montaup Electric Company for a determination by the Department of Telecommunications and Energy that Somerset Station and Wyman Station may be designated eligible facilities pursuant to Section 32 of the Public Utility Holding Company Act of 1935 as amended.

Request by Eastern Edison Company for a determination by the Department of Telecommunications and Energy that Eastern Edison Company is exempt from filing any and all contracts for standard offer service under G.L. c. 164, § 94A, because an alternative process or incentive mechanism exists that is in the public interest.

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I. INTRODUCTION

On December 23, 1997, the Department of Telecommunications and Energy ("Department") issued its final order in Eastern Edison Company, D.P.U./D.T.E. 96-24 (1997) ("D.P.U./D.T.E. 96-24") and approved an offer of settlement ("Restructuring Settlement Agreement") of electric restructuring issues submitted by Eastern Edison Company⁽¹⁾ ("EECo") and Montaup Electric Company⁽²⁾ ("Montaup") (collectively "Companies" or "EUA"). On December 4, 1998, EECo and Montaup, filed with the Department a petition ("Initial Petition") for (1) approval of the Companies' Amended Plan for Implementing Divestiture and Corporate Restructuring filed on November 21, 1997 ("Divestiture Plan"),⁽³⁾ (2) approval for the sale of Montaup's 160 megawatt ("MW") Somerset Station ("Somerset") electric generating plant to Somerset Power LLC,⁽⁴⁾ (3) approval of the sale of Montaup's 1.96 percent ownership interest in Wyman Station Unit 4 ("Wyman 4") generating plant to FPL Energy Wyman IV LLC⁽⁵⁾ ("FPL"). In addition, the Companies request a determination by the Department that Somerset and Montaup's share of Wyman 4 may each be designated an eligible facility, pursuant to the Public Utility Holding Company Act of 1935 as amended ("PUHCA"), 15 U.S.C. § 79z-5a(c).⁽⁶⁾

On December 15, 1998, the Companies filed with the Department an amended petition ("Amended Petition"), including, in addition to the approvals and determinations sought in the Initial Petition, a request for a determination by the Department that EECo is exempt from filing any and all contracts for standard offer service under G.L. c. 164, § 94A because an alternative process or incentive mechanism exists that is in the public interest. In particular, the Companies seek such a determination with respect to four identified wholesale standard offer service agreements: (1) Agreement between EECo and TransCanada Power Marketing, Ltd. ("TransCanada"), entered into on April 7, 1998; (2) Agreement between EECo and NRG Energy Power Marketing, entered into on October 13, 1998; and (3) two Agreements between EECo and Constellation Power Source, Inc. ("Constellation"), both entered into on December 21, 1998 (collectively "Standard Offer Agreements").

Pursuant to notice duly issued, the Department conducted two public hearings in this matter: one in EECo's service territory in Brockton on January 6, 1999, and one at the Department's offices in Boston on January 11, 1999. At the procedural conference conducted immediately following the second public hearing, the Attorney General of the Commonwealth intervened as of right pursuant to G.L. c. 12, § 11E. The Department granted petitions for limited participant status of Commonwealth Electric Company, Cambridge Electric Light Company, Constellation Power Source, Inc., and Somerset Power LLC. Evidentiary hearings in this matter were held on February 24 and 25, 1999. The Companies sponsored the testimony of four witnesses: Michael J. Hirsh, vice-president, EUA Service Corporation and EECo; Kevin A. Kirby, vice-president, EUA Service Corporation, EECo and Montaup; Donald T. Sena, assistant treasurer, EUA Service Corporation and all EUA subsidiary companies, including EECo and Montaup;

and R. John Dingle, vice-president, Reed Consulting Group. The evidentiary record consists of 64 exhibits and responses to two record requests. No briefs have been filed.

On March 22, 1999, the Companies filed with the Department a Stipulation and Agreement ("Stipulation") among EEC_o, Montaup, and the Attorney General (collectively "Parties").⁽⁷⁾ In the Stipulation, the Parties offer a negotiated resolution of all issues in this docket. Accordingly, the remaining sections of this Order describe the proposed divestiture transactions and the significant terms of Stipulation, and provide the Department's analysis and findings with respect to the Stipulation and the requirements of the Electric Industry Restructuring Act ("Restructuring Act").⁽⁸⁾

II. PROPOSED DIVESTITURE TRANSACTIONS

A. Introduction

The proposed divestiture transactions consist of the sale of Montaup's 160 MW Somerset Station electric generating plant and the sale of Montaup's 1.96 percent interest in Wyman 4, a 620 MW electric generating plant located in Yarmouth, Maine. According to the Companies, the competitive bidding process consisted of three stages: (1) Bidder Interest and Qualification; (2) Indicative Bids; and (3) Final Bids.

B. Description of the Divestiture Process

In the Bidder Interest and Qualification stage, Montaup sent out early interest letters to over 1,200 prospective bidders potentially interested in buying any of its non-nuclear electric generation assets (Exh. RJD-1, at 9). These letters included instructions to guide persons interested in seeking additional information, or wishing to participate in the bidding process (*id.*). Similar information was also posted on EUA's website (*id.*). Montaup received letters of interest from 26 potential bidders (*id.* at 10). All interested parties were then required to execute confidentiality agreements with Montaup (*id.*). Of the 26 parties initially expressing interest, 23 signed such confidentiality agreements (*id.*).

In the Indicative Bidding stage, bidders had additional information about the assets: including an Information Memorandum, access to a records room, tours of the plants, numerous records on compact disks, and a secure website devoted strictly to the divestiture process (*id.* at 11). Each non-binding indicative bid had to state exceptions to the Purchase and Sale Agreement and Transition Contract, describe the bidder, and summarize the bidder's financial qualifications and operating experience (*id.*). At the end of this process, five qualified bidders remained for Somerset and two remained for the Wyman 4 interest (*id.* at 13). According to Montaup, this "short-list" of bidders resulted not from Montaup's excluding bidders but from certain bidders' failure to go further (Exh. DTE-1-6).

In the Final Bidding stage, Montaup continued to provide information as earlier described but supplemented by more comprehensive meetings with each bidder (Exh. RJD-1, at 15). Montaup issued a revised Purchase and Sale Agreement, amended on the basis of

bidder comments (id. at 14). Information flow maintained strict confidentiality about each bidder (id.). In the end, Montaup received three final bids for Somerset and two for the Wyman 4 interest (id. at 16). Montaup began confidential negotiations with each bidder and eventually chose the bidder offering the highest value for each asset.

On July 24, 1998, Montaup accepted a bid from FPL for Montaup's 1.96 percent interest in Wyman 4 in the amount of \$2,400,000 (id. at 17). In addition, on October 15, 1998, Montaup accepted a bid from NRG Energy, Inc.⁽⁹⁾ ("NRG") for Somerset in the amount of \$54,750,000 (id.).

III. DESCRIPTION OF THE STIPULATION

The Stipulation represents a comprehensive and company-specific resolution of all issues in this docket, and its approval is expressly conditioned upon the Department's acceptance of all of its provisions. These issues, as presented in the Stipulation submitted to the Department by the Companies on March 22, 1999, include (1) the sale of Montaup's 160 MW Somerset Station electric generating plant to Somerset Power LLC, (2) the sale of Montaup's 1.96 percent ownership interest in Wyman 4 to FPL; (3) approval of the Companies' proposed Divestiture Plan; (4) a finding regarding the jurisdiction of Federal Energy Regulatory Commission ("FERC") to (a) determine the appropriate level of the contract termination charge ("CTC") and any adjustments to the Reconciliation Account, and (b) approve the sale of Montaup's purchased power agreements ("PPAs"), and (5) approval of the Companies' request to exempt the four Standard Offer Agreements between EEC0 and its wholesale standard offer suppliers from further review and approval under G.L. c. 164, § 94A. The key provisions of the proposed settlement are discussed below.

First, the Parties agree that the sales of (1) Somerset to Somerset Power LLC, a subsidiary of NRG, which is itself a wholly-owned subsidiary of Northern States Power Company, for \$54.75 million, and (2) the sale of Wyman 4 to FPL, a wholly-owned subsidiary of FPL Energy, Inc., for \$2.4 million, fully comply with the divestiture requirements included in the Restructuring Act and the Restructuring Settlement Agreement approved by the Department in D.P.U./D.T.E. 96-24 and the FERC in Docket Nos. ER97-2800-000, ER97-3127-000, and ER97-2338-000 (Stipulation at ¶ 1).

Second, the Parties seek approval of the Companies' proposed divestiture transactions as consistent with G.L. c. 164, §§ 1A(b)(1) and (2), and the Restructuring Settlement Agreement (id. at ¶ 2). According to the Stipulation, this approval would satisfy the requirement under the terms of the Restructuring Settlement Agreement that the Department should also approve the Companies' Divestiture Plan (id. citing Restructuring Settlement Agreement § V.D.1).

Third, under the terms of the Restructuring Settlement Agreement, (a) the appropriate level of the CTC (including the calculation of the Residual Value Credit and any adjustments to the Reconciliation Account, and (b) the approval of the sale of Montaup's PPAs are matters to be determined by the FERC (id. at ¶ 3 citing Restructuring

Settlement Agreement at Att. 3, Wholesale Stipulation and Agreement §§ 3.2, 3.3, 3.4, 5.1 to 5.3, 6.1.3). The Stipulation states that the Department has approved this process in D.P.U./D.T.E. 96-24 and has found it to be in the public interest (id. at ¶ 3).

Fourth, the FERC must review the CTC for appropriateness (following the dispute resolution process provided for under the terms of the Restructuring Settlement Agreement) and must approve the sale of Montaup's PPAs. Therefore, the Department need not make any findings on these issues (id. at ¶ 4). Accordingly, the Stipulation states that "[n]either the [P]arties' entry into the Stipulation nor the approval by the Department of its terms or of the divestiture of Somerset and Wyman, shall constitute or in any way be interpreted to evidence approval of or any finding on the level of the [CTC] and/or sale of Montaup's PPAs" (id. at ¶ 5).

Fifth, the term "Standard Offer Agreements" means: the wholesale standard offer service agreements between EEC0 and TransCanada, entered into on April 7, 1998, and between EEC0 and NRG Energy Power Marketing, entered into on October 13, 1998; and two agreements between EEC0 and Constellation, each entered into on December 21, 1998 (id. at ¶ 6).

Sixth, the Parties acknowledge that the Standard Offer Agreements between EEC0 and Constellation are subject to a finding by the Department that "Eastern's actions in regard to [the Standard Offer] Agreement(s) are in accordance with G.L. c. 164 § 94A and § 1B(b) and [the Standard Offer] Agreement(s) may become effective. . . ." (id. at ¶ 7). As stated in the Stipulation, the Standard Offer Agreements were negotiated pursuant to the Restructuring Settlement Agreement, which, in turn, was reviewed and approved by the Department in D.P.U./D.T.E. 96-24. The Standard Offer Agreements are an integral part of the approvals granted by the FERC in allowing Montaup to terminate its all-requirements contract with EEC0 (id.).

The Parties request that the Department exempt the Standard Offer Agreements between EEC0 and its wholesale standard offer suppliers from further review and approval under G.L. c. 164, § 94A. The Parties justify their request with reference to G.L. c. 164, § 94A as amended by the Restructuring Act: "The [D]epartment is authorized to exempt any electric or generation company from any or all provisions of this section upon a determination by the [D]epartment ... that an alternative process or incentive mechanism is in the public interest."⁽¹⁰⁾ Specifically, the Parties contend that the FERC's continuing jurisdiction with respect to these Standard Offer Agreements constitutes the alternative process that is in the public interest: Accordingly, the Parties acknowledge that the FERC will have continuing jurisdiction under the Federal Power Act to investigate and supervise the enforcement of all aspects of the Restructuring Settlement Agreement (id.).

The Parties also agree that the record supports a finding by the Department that EEC0 has complied with the Standard Offer Service competitive bidding requirements set forth in the Restructuring Settlement Agreement and G.L. c. 164, § 1B(b) (id.). Based on the foregoing, the Parties request that the Department enter a finding in its final order that the

above-stated conditions precedent in the Constellation Standard Offer Agreements have been fully satisfied (id.).

Seventh, the Parties agree that the record in this proceeding should be reopened to receive the Affidavit of Michael J. Hirsch, which establishes that the standard offer obligations did not detract from the value paid for Somerset (id. at ¶ 8).

Eighth, the Parties request that the Department find that it has sufficient regulatory authority, resources, and access to books and records to exercise its duties, and that the designation of Somerset and Wyman 4 as eligible facilities, as defined in Section 32 of PUHCA (as amended by the Energy Policy Act of 1992), (1) will benefit consumers, (2) is in the public interest, and (3) does not violate state law (id. at ¶ 9).

Ninth, the Stipulation is the product of negotiations (id. at ¶ 10). The content of those negotiations shall be privileged⁽¹¹⁾ and all offers of settlement shall be without prejudice to the position of any party or participant presenting such offer (id.).

Tenth, the Stipulation is submitted on the condition that it will be approved in full by the Department and on the further condition that if the Department does not approve the Stipulation in its entirety, the Stipulation shall be deemed withdrawn and shall not constitute a part of the record in any proceeding or used for any purpose (id. at ¶ 11).

Finally, acceptance of the Stipulation by the Department in this proceeding shall not be deemed to restrain the Department's exercise of its authority to promulgate future orders, regulations or rules which resolve similar matters affecting other parties in a different fashion (id. at ¶ 12). Moreover, the signing of the Stipulation and acceptance by the Department in this settlement shall not restrain or bind the Parties hereto from asserting different positions on the law and the facts in any other judicial or administrative proceeding (id.).

IV. STANDARD OF REVIEW

In assessing the reasonableness of an offer of settlement, the Department must review the entire record as presented in a company's filing and other record evidence to ensure that the settlement is consistent with Department precedent and the public interest. See Western Massachusetts Electric Company, D.P.U. 92-13, at 7 (1992); Barnstable Water Company, D.P.U. 91-189, at 4 (1992); Cambridge Electric Light Company, D.P.U. 89-109, at 5 (1989); Southbridge Water Supply Company, D.P.U. 89-25 (1989); Eastern Edison Company, D.P.U. 88-100, at 9 (1989). A settlement among the parties does not relieve the Department of its statutory obligation to conclude its investigation with a finding that a just and reasonable outcome will result. Essex County Gas Company, D.P.U. 96-70, at 5-6 (1996); Fall River Gas Company, D.P.U. 96-60, at 5 (1996).

The Legislature has vested broad authority in the Department to regulate the ownership and operation of electric utilities in the Commonwealth. G.L. c. 164, § 76; Cambridge Electric Light Company, D.P.U./D.T.E. 97-111, at 17 (1998); Boston Edison Company,

D.P.U. 97-113 (1998). The Department's authority was most recently augmented by enactment of the Restructuring Act. Boston Edison Company, D.P.U./D.T.E. 96-23, at 9 (1998). The Restructuring Act requires that each electric company organized under the provisions of Chapter 164 of the General Laws file a plan for restructuring its operations to allow for the introduction of retail competition in generation supply, in accordance with the provisions of G.L. c. 164, § 1A(a). Among other things, the Restructuring Act requires that all restructuring plans contain detailed accounting of the company's transition costs and a description of the strategy to mitigate those transition costs. Id. One possible mitigation strategy noted in the Restructuring Act is the divestiture of a company's generating units. Id.

In reviewing a company's proposal to divest its generating units, the Department considers the consistency of the proposed transactions with the company's restructuring plan, or in some cases the company's restructuring settlement, and the Restructuring Act. See, e.g., Cambridge Electric Light Company, Commonwealth Electric Company, Canal Electric Company Asset Divestiture, and Eastern Edison Company and Montaup Divestiture, D.T.E. 98-78/83 (1998); Boston Edison Company, D.T.E. 97-113 (1998); Massachusetts Electric Company, D.P.U./D.T.E. 97-94 (1998); Massachusetts Electric Company, D.T.E. 96-25 (Phase II) (1997). A divestiture transaction will be determined to be consistent with a company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the "sale process is equitable and maximizes the value of the existing generation facilities being sold." G.L. c. 164, § 1A(b)(1). A sale process will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold, if the company establishes that it used a "competitive auction or sale" that ensured "complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale." G.L. c. 164, § 1A(b)(2).

The Restructuring Act provides that all proceeds from any such divestiture of generating facilities "that inure to the benefit of ratepayers, shall be applied to reduce the amount of the selling electric company's transition costs." G.L. c. 164, § 1A(b)(3). Where the Department has approved a company's restructuring plan or settlement as consistent or substantially compliant with the Restructuring Act, the Department will approve a company's proposed ratemaking treatment of any divestiture proceeds if the company's proposal is consistent with the company's approved restructuring plan or settlement.

V. ANALYSIS AND FINDINGS

The Department has reviewed the Stipulation in light of the Companies' proposal and the entire record in this proceeding. The Department has also evaluated whether the Stipulation is consistent with the Companies' Restructuring Settlement Agreement, as approved in D.P.U./D.T.E. 96-24, and the Restructuring Act. The Stipulation states, and the record evidence supports, our conclusion that the Companies developed and implemented a divestiture process that satisfied all of the conditions of the Companies' Restructuring Settlement Agreement, which was approved as a just and reasonable resolution of EUA's restructuring issues by the Department in D.P.U./D.T.E. 96-24. In

particular, the facts that the Companies contacted over 1,200 potential bidders, designed an auction process that enabled all interested persons equal and complete access to all relevant information, and endeavored (successfully) to maintain confidentiality between and among the participants in process, (see Exh. RJD-1), provides ample support for our determination that the Companies offered these generating resources for sale through an open, public auction. The record also demonstrates they took reasonable steps to mitigate transition costs as required by the Restructuring Act. Therefore, based on the record evidence and our conclusion that the Stipulation is consistent with the Companies' Restructuring Settlement Agreement, we thus conclude that the Stipulation is consistent with our precedent. Moreover, because the Stipulation is consistent with the requirements of the Restructuring Act and our precedent, its approval ensures an outcome that is, on balance, a just and reasonable resolution of the issues confronting an electric company undergoing restructuring and its ratepayers. Accordingly, the Department hereby finds that the Stipulation is a just and reasonable resolution of the issues presented in this docket, and thus, that it is in the public interest.

In addition to approval of the Stipulation because it is, on balance, a just and reasonable resolution of restructuring issues for an electric company and its ratepayers, and thus, in the public interest, the Department, upon review of the entire record in this proceeding hereby makes the following additional findings requested by the Parties in the Stipulation.

The Stipulation states that the sale of Somerset and Montaup's 1.96 percent ownership interest in Wyman 4 fully complies with the divestiture requirements included in the Restructuring Act, the Companies' Restructuring Settlement Agreement and the FERC in Docket Nos. ER97-2800-000, ER97-3127-000 and ER97-2338-000. The Department concludes, after review of the record in this proceeding, that the auction process designed by Montaup was a "competitive auction or sale," that Montaup provided "complete, uninhibited, non-discriminatory access to all relevant data and information by any and all interested parties seeking to participate in such auction or sale," and hence, that the sale process was equitable and maximized the value of the existing generation facilities being sold.⁽¹²⁾ Therefore, the Department determines that the sale of Somerset and Montaup's 1.96 percent ownership interest in Wyman 4 fully complies with the divestiture requirements included in G.L. c. 164, §§ 1A(b)(1) and (2), the Companies' Restructuring Settlement Agreement, and the FERC in Docket Nos. ER97-2800-000, ER97-3127-000 and ER97-2338-000. We note that this approval also satisfies the requirement under the terms of the Companies' Retail Settlement Agreement that the Department should also approve the Companies' Divestiture Plan.

With respect to Montaup's CTC and/or the sale of Montaup's PPAs, we hereby state that neither the Parties' entry into this Stipulation, nor the approval by the Department of its terms, or of the divestiture of Somerset and Wyman 4, shall constitute, or in any way evidence approval of, or any finding on, the level of the CTC, and/or the sale of Montaup's PPAs.

Regarding the Standard Offer Agreements between EEC_o and Constellation, the Department finds, upon review of the entire record in this proceeding, that EEC_o's actions in regard to the Standard Offer Agreements are in accordance with G.L. c. 164, § 94A and § 1B(b) and that the Standard Offer Agreements may become effective. In addition, the Department concludes that EEC_o has complied with the Standard Offer Service competitive bidding requirements set forth in the Restructuring Settlement Agreement and G.L. c. 164, § 1B(b). Finally, based on the foregoing conclusions, the Department concludes that the conditions precedent in the Constellation Standard Offer Agreements have been fully satisfied.

Regarding the designation of Somerset and Wyman 4 as eligible facilities, the Department notes that Somerset Power LLC and FPL propose to purchase these units in order to operate them as eligible facilities, with a purchase price incorporating that expectation. Based on the facts that (1) the expectation of eligible facility status underlies the purchase prices and increases the mitigation of transition costs to be paid by ratepayers, and (2) that timely administrative action may avoid additional costs that may be collected from the Companies' ratepayers, the Department finds that designation of these existing generating facilities as eligible facilities will benefit customers. The Department notes that these benefits have already been passed through (subject to reconciliation) to customers as a result of the Companies' implementation of a Residual Value Credit and concomitant reduction in EEC_o's CTC. See, Eastern Edison Company, D.T.E. 99-30, at 1 (1999). A portion of this reduction in the CTC was due to the application of proceeds from the divestiture of Somerset and Wyman 4. Accordingly, because such designation has and will continue to benefit customers, the Department finds that it is in the public interest. Finally, the Department finds that the designation of the requested facilities as eligible facilities does not violate state law, but rather, furthers the objectives of the state law because their divestiture has been undertaken in order to comply with the Restructuring Act, and because competing wholesale generators will be an integral part of the competitive generation industry that the Restructuring Act was designed to enable. Accordingly, based on the Department's broad authority to regulate the ownership and operation of electric facilities in the Commonwealth pursuant to, but not limited to, sections 76 (general supervisory power), 80 and 85 (access to books and records), 1B and 93 (jurisdiction over rates), and 94G (performance reviews of generating units), of chapter 164 of the Massachusetts General Laws, we aver that we have sufficient regulatory authority, resources, and access to books and records to exercise our duties, and based on our review of the entire record in this proceeding, we conclude that the designation of Somerset and Wyman 4 as eligible facilities, as defined in section 32 of PUHCA (as amended by the Energy Policy Act of 1992), (1) will benefit customers, (2) is in the public interest, and (3) does not violate state law.

In accordance with the terms of the Stipulation, acceptance of the Stipulation by the Department shall not restrain the Department's exercise of its authority to promulgate future orders, regulations or rules which resolve similar matters affecting other parties in a different fashion. In addition, our approval of the Stipulation does not constitute a determination or finding by the Department on the merits of any allegations, arguments

or contentions made in this proceeding, nor does it set a precedent for future proceedings before the Department, whether ultimately settled or adjudicated.

VI. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That the Stipulation and Agreement jointly sponsored by Eastern Edison Company, Montaup Electric Company, and the Attorney General of the Commonwealth be, and hereby is, approved.

By Order of the Department,

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Eastern Edison Company is wholly-owned subsidiary of Eastern Utility Associates, Inc.
2. Montaup Electric Company is a wholly-owned subsidiary of Eastern Edison Company (Initial Petition at 2).
3. Along with the Initial Petition, on December 4, 1998, the Companies filed a Notice of Withdrawal of Financing Portions of the Divestiture Plan. Because the Department's procedural rules allow a party to "withdraw an initial pleading filed with the Department at any time prior to the commencement of a hearing on such pleading," and because the Divestiture Plan is an initial pleading within the meaning of 220 C.M.R. § 1.04(4)(a), such a withdrawal was effective upon filing.
4. Somerset Power LLC is an indirect wholly-owned subsidiary of NRG Energy, Inc., which is itself a wholly-owned subsidiary of Northern States Power Company (Initial Petition at 1).
5. FPL Energy Wyman IV LLC is a wholly-owned subsidiary of FPL Energy, Inc. (Initial Petition at 2).
6. Section 79z-5a(a)(1) of Title 15 of the United States Code defines an exempt wholesale generator as any person who is "exclusively in the business of owning, operating, or both owning and operating all or part of one or more eligible facilities and selling electric energy at wholesale." Further, an eligible facility is used for the "generation of electric energy exclusively for sale at wholesale." 15 U.S.C. § 79-5a(a)(2)(A). 15 U.S.C. § 79z-5a(c) requires a State Commission to have made three

specific determinations before the Federal Energy Regulatory Commission ("FERC") may designate an existing facility an eligible facility: (1) such designation must benefit consumers; (2) such designation must be in the public interest; and (3) such designation must not violate state law.

7. The Companies also represent that the limited participants in this matter assent to the Stipulation (Cover letter from Laura S. Olton, McDermott, Will & Emery, to Mary L. Cottrell, Secretary, Department of Telecommunications and Energy, March 22, 1999).

8. An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provisions of Electricity and Other Services, and Promoting Enhanced Consumer Protection Therein, signed by the Governor on November 25, 1997. St. 1997, c. 164.

9. NRG Energy, Inc. ("NRG") subsequently assigned its right to purchase Somerset to Somerset Energy LLC, a newly-formed subsidiary of NRG (Initial Petition at 2; Exh. MJH-1, at 2).

10. We note that the evidentiary record contains substantial evidence that the Standard Offer Agreements fully comport with the requirements of G.L. c. 164, § 94A prior to its amendment by the Restructuring Act.

11. The Parties to the Stipulation have used this term somewhat loosely. In allowing the Stipulation, we note that the Department is long on record as favoring negotiation and compromise and as being favorably disposed to exclude evidence on such points from its proceedings, if asked to do so. But as the Department went to some length to point out in Boston Gas Company, D.P.U. 88-67 (Phase I) at 9-25 (1988), such exclusion is a policy and relevancy question, not an evidentiary question of privilege under G.L. c. 30A, § 11(2). See id. at 19 n.4 and 21-22. We allow this exclusionary provision of the Stipulation on that understanding.

12. Pursuant to the Stipulation at ¶ 8, the Department hereby agrees to reopen the record in this proceeding to receive the Affidavit of Michael J. Hirsh, as Exhibit MJH-3, which establishes that bidders in the Companies' subject divestiture transaction in all likelihood positively valued the assignment of standard offer responsibility as a component of the transaction.